No. 16,494

United States Court of Appeals

For the Ninth Circuit

WILLIE A. DAVIS,

Appellant,

vs.

AETNA LIFE INSURANCE COMPANY, CHARLES S. SWANEGAN, DAISY SWANEGAN, and LLOYD W. SWANEGAN, as Administrator,

Appellees.

Upon Appeal from the United States District Court, Southern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

SOLOMON E. JOHNSON,
GARRY, DREYFUS, MCTERNAN & KELLER,
703 Market Street, San Francisco 3, California,
Attorneys for Appellant.

Table of Authorities Cited

Cases

Codes

No. 16,494

United States Court of Appeals

For the Ninth Circuit

WILLIE A. DAVIS,

Appellant,

vs.

AETNA LIFE INSURANCE COMPANY, CHARLES S. SWANEGAN, DAISY SWANEGAN, and LLOYD W. SWANEGAN, as Administrator,

Appellees.

Upon Appeal from the United States District Court, Southern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

Appellees' brief herein suggests little to the court which has not been presented and discussed in appellant's opening brief. However, it is deemed in order briefly to restate and amplify upon appellant's position before this court.

In the first place, all parties agree that a beneficiary whose actual conduct in causing the death of the insured amounts in fact to voluntary manslaughter cannot, for reasons of public policy, receive the benefits of the insurance policy.

It is, on the other hand, clear that conduct of a beneficiary which amounts only to gross negligence or even involuntary manslaughter does not preclude recovery.

Throop v. Western Indemnity, 49 Cal. App. 322, 193 Pac. 263.

Appellant's case, then, rests upon two points:

1. That the trial court did not exercise its duty to ascertain the true facts of the homicide, as required by the decisions in

Prudential Ins. Co. of America v. Harrison (D.C. Cal. 1952), 106 Fed Supp. 419;

Manufacturers Life Ins. Co. v. Moore (D.C. Cal. 1953), 116 Fed. Supp. 171.

2. That if the appellant had been afforded an opportunity to prove the true facts, the homicide would have been revealed to be involuntary manslaughter.

Not only was no opportunity afforded appellant to present the facts, but he was in no position to move the court to do so, being incarcerated in a state prison.

In re Bagwell, 26 Cal. App. 2d 418, 79 Pac. 2d 395.

The motions and affidavits with which the record is "replete", as appellees say, were filed after the court's decision, and did not deal with the points raised here.

There can be no question but that the decision of the District Court was based entirely on the fact of the conviction of appellant as a defendant in the criminal court, and that the provisions of Section 258 of the Probate Code were relied upon to justify this result.

When the court made its decision it had before it only the brief filed by the Swanegans. This brief maintained that by reason of the provisions of Probate Code, section 258, and the "public policy" resulting therefrom, appellant's "presence at the trial is not required and his being incarcerated is no bar to bringing the matter to trial." (Tr. p. 37.) On the basis of this reasoning the court entered a summary judgment without knowledge of the true facts of the death of the insured.

All courts considering the question have ruled that the provisions of Section 258 apply only to succession of property and do not govern cases not concerned with rights of succession in probate.

In the *Harrison* case, supra, p. 2, the court says:

> "That this enactment has no application appears from its language. It applies an artificial standard, i.e., 'conviction' of murder . . . Further, the statute relates only to succession in probate, which is an entirely different circumstance than is presented here." (p. 421)

And, again, the court rules:

> "If the beneficiary is barred from recovery, it must be upon the circumstances of the violent death, not upon the record of the criminal litigation." (p. 422)

In the *Moore* case, supra, p. 2, with reference to Probate Code, section 258, the view of the court is that:

> "The statute mentioned is a probate law only and refers to the effect of a criminal court judg-

ment and not to the facts upon which the judgment rests." (pp. 173, 174)

For a recent case decided after the amendment of Probate Code, section 258 to include voluntary manslaughter, see,

Abbey v. Lord, 168 Cal. App. 2d 499, 336 Pac. 2d 226.

In that case, involving the right to joint tenancy property of a joint tenant found in a criminal proceeding guilty of voluntary manslaughter, the court recognized that the Probate Code section did not apply, but upheld the trial court's ruling, *on evidence presented in the civil trial,* that the joint tenant's intentional killing precluded his claim.

In none of the cases ruling upon the points here involved is any mention made of the failure of the criminal court to find the specific nature of the manslaughter, voluntary or involuntary. The courts considering the insurance question did not go into the matter of determining the actual facts of the homicide for the reason that the judge in the criminal trial had not determined the exact nature thereof. They rule, specifically and without any lack of clarity, that the findings and judgment in the criminal proceeding are not binding upon the parties to the civil action, and that the court in the civil action must make its own determination. This was not done here.

We submit that appellant should by order of this court be afforded the opportunity of presenting the true facts of the homicide and that if such facts lead

to a conclusion that the homicide was involuntary the appellant should be entitled to the proceeds of the policy. No rule of law or public policy stands against this conclusion.

Dated, San Francisco, California,
February 9, 1960.

Respectfully submitted,
SOLOMON E. JOHNSON,
GARRY, DREYFUS, MCTERNAN & KELLER,
By CHAS. R. GARRY,
Attorneys for Appellant.